Noteworthy Decision Summary

Decision: WCAT-2007-00430 **Panel:** S. Polsky Shamash **Decision Date:** Feb. 5, 2007
M. Gelfand,
L. Alcuitas-Imperial

Findings of fact versus reviewable decision – Jurisdiction when making a decision - Best Practices Information Sheet #14 "Findings of Fact"

This decision is noteworthy as the three person (non-precedent) panel considers the fundamental question of whether a statement by a Workers' Compensation Board operating as WorkSafeBC (Board) officer is merely a finding of fact that cannot be the subject of a review or appeal, or whether that statement is a decision that can be the subject of a review or appeal.

In November 1997, the worker, a psychiatric nurse, was sitting on a chair at work when it broke. The Board accepted the worker's claim for a soft tissue injury to her neck and low back. The worker appealed various medical issues on her claim to two different Medical Review Panels (MRP) with specialists in orthopaedic surgery and psychiatry, respectively. In a December 15, 2004 letter, a Board officer implemented the findings of both MRPs.

There were also two memos on the claim file, both dated December 15, 2004. The first memo reported a team meeting which was called to address the worker's limitations, treatment and referral to the Vocational Rehabilitation Department. After reviewing the accepted psychological limitations, the case manager said that the worker would not be referred to the Vocational Rehabilitation Department because nothing flowed from the implementation of the MRP certificates to warrant further vocational rehabilitation intervention. In the second memo the case manager recorded the decisions stemming from the MRP certificates and the team meeting. In addition to the matters set out in the decision letter, he said that, as noted in the team meeting, no referral to the Vocational Rehabilitation Department was indicated. He also said that he would be sending out a decision letter outlining his implementation of the MRP certificates.

The worker requested a review of the December 15, 2004 letter, noting that she only disagreed with the statement that she is not limited to part-time work. In an August 8, 2005 Review Division decision (*Review Reference #28687)* a review officer found that the question of the worker's restrictions and limitations was a finding of fact made for the purpose of determining the worker's eligibility for a permanent disability award and that the letter was therefore not reviewable. The worker appealed the Review Division decision. The chair of WCAT assigned the appeal to a three-person panel pursuant to section 238(5) of the *Workers Compensation Act* (Act). The issue on appeal was whether the Board's December 15, 2004 letter contained a reviewable decision.

The panel reviewed historical developments that led to the appeal, the underlying legislative scheme, Board policy and practice, competing policy interests, the approach taken by previous WCAT panels, and the submissions of the parties to the appeal. The panel concluded that the December 15, 2004 letter contained a reviewable decision regarding the worker's entitlement to a referral to the Vocational Rehabilitation Department, which is a prerequisite for entitlement to benefits under section 16 of the Act, as it had the same effect as a refusal of all rehabilitation benefits. The panel noted that, while the decision refusing to refer the worker to the Vocational

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Rehabilitation Department was not articulated explicitly in the December 15, 2004 letter, it was included by necessary implication since that decision was made at the team meeting and recorded in the related memo of that same date, and the letter purported to communicate the matters discussed and decided in that team meeting.

The panel further concluded that the findings of fact regarding the worker's restrictions and limitations set out in the December 15, 2004 letter were not reviewable. The worker is entitled to raise the issue of her restrictions and limitations at the time the Board makes the decision on her loss of earnings award and at any subsequent review or appeal of that decision.

Although not necessary to the decision, the panel added that the "findings of fact" model articulated by the review officer in the decision before the panel, which had made its way into the Best Practices Information Sheet #14 "*Findings of Fact*", had merit subject to reservations regarding the applicability of section 96(1) to the analysis. The panel took the position that these documents were nothing more than a repackaging of jurisdiction. That is, every decision-maker at every level of the workers' compensation system must determine what their jurisdiction is when making a decision on a matter, whether there are previous decisions which limit their jurisdiction, whether they have the statutory jurisdiction to make the decision, etc. The panel also discourage Board officers from issuing letters that may be perceived by the parties as containing reviewable decisions where that was not the Board's intention. If such letters are issued, the panel advised that it is crucial that they be clear that they are interim, changeable, not reviewable and may or may not form the basis of a later decision.

WCAT Decision Number: WCAT-2007-00430
WCAT Decision Date: February 05, 2007
Panel: Susan L. Polsky Shamash, Vice Chair
Michelle Gelfand, Vice Chair
Luningning Alcuitas-Imperial, Vice Chair

Introduction

In November 1997, the worker, a psychiatric nurse, was sitting on a chair at work when it broke. The Workers' Compensation Board, now operating as WorkSafeBC (Board), accepted the worker's claim for a soft tissue injury to her neck and low back.

The worker appealed various medical issues on her claim to two different Medical Review Panels. A Medical Review Panel (MRP) with specialists in orthopaedic surgery issued a certificate on April 17, 2004. Another MRP with specialists in psychiatry issued its certificate on April 28, 2004.

In a December 15, 2004 letter, a Board officer implemented the findings of both MRPs. The Board officer stated:

- the orthopaedic MRP certified that the worker did not have a disability causally related to her compensable back injury, that the cause of her back disability is a pre-existing degenerative disc disease and that the compensable injury did not cause a permanent aggravation of her pre-existing condition;
- therefore, the worker was not entitled to any further wage loss or health care benefits as a result of her compensable back sprain;
- as a result of the psychiatric MRP, the worker's claim was accepted for major depression, in remission, as well as post-traumatic stress disorder (PTSD) and the worker was referred to the Board's Disability Awards Department for assessment of a permanent functional impairment award for her accepted psychological conditions;
- as a result of the accepted psychological conditions, the worker was limited to work that did not involve institutionalized psychiatric patients, adolescents or any potentially violent individuals; and
- the worker was not limited to part-time work because her pain complaints were related to a pre-existing back disability that had not been aggravated by the compensable injury.

There are also two memos on the claim file, both dated December 15, 2004. The first memo reported a team meeting which was called to address the worker's limitations, treatment and referral to the Vocational Rehabilitation Department. After reviewing the accepted psychological limitations, the case manager said that the worker would not be

referred to the Vocational Rehabilitation Department because nothing flowed from the implementation of the MRP certificates to warrant further vocational rehabilitation intervention.

In the second memo of December 15, 2004, the case manager recorded the decisions stemming from the MRP certificates and the team meeting. In addition to the matters set out in the decision letter, he said that, as noted in the team meeting, no referral to the Vocational Rehabilitation Department was indicated. He also said that he would be sending out a decision letter outlining his implementation of the MRP certificates.

The worker requested a review of the December 15, 2004 letter, noting that she only disagreed with the statement that she is not limited to part-time work. In an August 8, 2005 decision (*Review Reference #28687)*, a review officer of the Board's Review Division found that the question of the worker's restrictions and limitations was a finding of fact made for the purpose of determining the worker's eligibility for a permanent disability award and that the letter was therefore not reviewable. The review officer did not consider whether he agreed with the restrictions and limitations. He confirmed the Board's December 15, 2004 decision that the claim should be referred for assessment of a permanent disability award.

The worker appeals the August 8, 2005 Review Division decision. She is represented by counsel. The employer is participating in this appeal and is represented by a consultant.

The chair of the Workers' Compensation Appeal Tribunal (WCAT) assigned this appeal to a three-person panel pursuant to section 238(5) of the *Workers Compensation Act* (Act). It was not assigned under section 238(6). Accordingly, this decision is not binding on other WCAT panels.

The panel has considered this appeal based on a review of the claim file and written submissions from the parties. The panel is satisfied that an oral hearing is not required, as the narrow issue before us turns on the application of law and policy to the relevant facts which are not in dispute. There is no issue of credibility.

Issue(s)

The following issue arises in this appeal:

1. Does the Board's December 15, 2004 letter contain a reviewable decision?

We have defined the issue under appeal as above, noting the following submissions by the worker's representative:

- the primary issue under appeal is whether there is a reviewable decision contained in the case manager's decision about the worker's restrictions and limitations;

- the worker does not dispute the referral of her claim to the Disability Awards Department for assessment of a permanent functional impairment award for her accepted psychological conditions; and,
- the worker is not disputing her entitlement to wage loss and health care benefits.

We will therefore only address the issue of whether there is a reviewable decision in the December 15, 2004 letter with respect to the worker's restrictions and limitations. Item #14.30 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) provides that:

> …WCAT will generally restrict its decision to the issues raised by the appellant in the appellant's notice of appeal and submissions to WCAT. The appellant is entitled by right to a decision on the issues expressly raised in the appeal.

Although the memorandum of December 15, 2004 was not specifically included in the review, it was issued at the same time as the letter. Its subject matter is so closely related to the December 15, 2004 letter that we consider it to be part of this appeal.

Jurisdiction

This appeal was filed with WCAT under section 239(1) of the Act, which provides that a final decision by a review officer, including a decision declining to conduct a review under that section, may be appealed to WCAT.

Background

In his August 8, 2005 decision, the review officer accurately recounted the events relevant to this appeal. We do not find it necessary to repeat that chronology.

Since the review officer's decision was issued, the Disability Awards Department has begun the process of reviewing the worker's claim. As of the date of writing, the Board has not yet rendered a formal decision on the worker's entitlement to a permanent partial disability award.

Submissions

The appellant's counsel filed her initial submissions on this appeal in two documents dated September 1, 2005 and February 8, 2006 respectively. In summary, she raised the following arguments:

- the review officer erred in failing to decide a reviewable issue, as he applied a patently unreasonable interpretation of section 96.2(1)(a) of the Act. His decision was also contrary to item #2.20 of the *Rehabilitation Services and Claims Manual* (RSCM);

- the Board made a decision, rather than a finding of fact, that the worker's inability to work full time is not claim-related, as a result of which he declined to award her a benefit, that is, a referral to the Vocational Rehabilitation Department. Moreover, the finding of fact will be determinative of her entitlement to a section 23(3) pension award; and
- the review officer's decision denies the worker the right to request a review of the Board's determination that she is limited to part-time work.

The appellant's counsel also submitted extensive arguments going to the merits of this appeal (that is, whether the worker has work limitations and restrictions due to her compensable injuries) and argued that the panel should accept that the worker is limited to part-time work due to the effects of her PTSD.

Appended to the February 8, 2006 written submission was an August 24, 2005 e-mail from another worker's advocate in which he noted that a review officer (in an unidentified review) took a different approach to that of the review officer in the decision before us. Using this alternate approach, the review officer felt bound by the Board's findings on the worker's restrictions and limitations contained in an unappealed decision in the context of a review about the worker's entitlement to a projected loss of earnings award.

The appellant's counsel requested several remedies:

- The panel should find that the Board's December 15, 2004 letter contains a reviewable decision regarding the worker's restrictions and limitations.
- In the alternative, the panel should find that the worker is entitled to raise the issue of her restrictions and limitations at the time of a Board decision on a loss of earnings award and at any subsequent review or appeal.

The respondent's representative asked that the panel find that the Board's December 15, 2004 letter did not contain a reviewable decision regarding the worker's restrictions and limitations. He submitted that the review officer made the correct decision. He also argued that, on the merits of the appeal, the issue of the worker's restrictions and limitations was thoroughly reviewed by a disability awards officer prior to granting the worker's pension. We note that the pension has not yet been granted because the employability assessment is still pending. We assume that the respondent's representative is referring to the worker's permanent functional impairment award entitlement which has been assessed.

In response, the appellant's counsel submitted that, based on the findings of fact, the Board officer made a reviewable decision to deny the worker a referral to the Vocational Rehabilitation Department. She also made further submissions about the merits of the appeal.

The panel wrote appellant's counsel on July 10, 2006 seeking clarification of the remedy sought. The panel observed that the worker works as a dog trainer, or a trainer of dog trainers, and has not asked the Board for any vocational rehabilitation assistance. If the December 15, 2004 case manager's letter includes a reviewable decision refusing to refer the worker for vocational rehabilitation assistance, the panel queried whether there was any remedy which could flow from the review.

The appellant's counsel responded on July 31, 2006 that the remedy which could flow from the review would include payment of health care benefits for depression and reinstatement of section 16 top-up benefits (or, in the alternative, income continuity benefits). She also submitted that the remedy of an employability assessment and consideration of a loss of earnings pension could flow from the review.

The appellant's counsel's July 31, 2006 submission was copied to the respondent's representative for information purposes only.

Law, Policy and Analysis

This appeal raises difficult issues that have wide implications for the workers' compensation system. The panel recognizes that the question of whether a statement by a Board officer is merely a finding of fact that cannot be the subject of a review or appeal, or whether that statement is a decision that can be the subject of a review or appeal, is very important to the Board, its stakeholders, individual parties to the review and appellate bodies. It raises many foundational questions: What is a decision? What is a finding of fact? When has a binding decision been made? In short, what is the jurisdiction of a decision-maker and how is it determined?

Given the significance of the issue under appeal, our analysis will take into account the historical developments that led to this appeal, the underlying legislative scheme, Board policy and practice, competing policy interests, the approach taken by previous WCAT panels, and the submissions of the parties to this appeal.

Historical Developments

Prior to the amendments to the Act occasioned by the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63), which came into effect on March 3, 2003, there were no time limits on reconsideration of previous decisions of the Board. Section 96(1) of the former Act set out the exclusive jurisdiction of the Board and the fact that its decisions were final and conclusive. Section 96(2) provided:

> Notwithstanding subsection (1), the board may at any time at its discretion reopen, rehear and redetermine any matter, except a decision of the appeal division, which has been dealt with by it or by an officer of the board.

This reconsideration power did not include decisions of the former Appeal Division or the former Review Board. Former section 96(3) gave the Appeal Division authority to reconsider a finding of the Review Board, but only on appeal under section 91(1). Section 96(4) gave the President of the Board the power to refer a finding of the Review Board to the Appeal Division for reconsideration, but only if the referral was made within 30 days of the Review Board finding. Appeal Division decisions were final and conclusive (section 96.1(1)). However, the Appeal Division had the power to reconsider its own decisions, both on new evidence grounds (section 96.1(3)), and on common law grounds.

Even though the Board had policy which limited the right to reconsider an unappealed decision to circumstances where significant new evidence was provided or where there was a mistake of evidence or law (former item #108.10, RSCM), the former construct was seriously criticized for resulting in a lack of finality in decision-making. Nonetheless, unless a decision was changed on appeal or reconsideration, it was final and conclusive on the matters decided. It was always necessary for subsequent decision-makers to determine the effect of previous decisions on their jurisdiction to make subsequent decisions.

Legislative Scheme since March 3, 2003

All of this was changed profoundly on March 3, 2003 by Bill 63.

The current section 96(1) still sets out the broad jurisdiction of the Board and speaks to the finality of Board actions or decisions. It provides:

> Subject to sections 239 and 240 [appeals to WCAT], the Board has exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising under this Part, and the action or decision of the Board on them is final and conclusive and is not open to question or review in any court…

Other subsections of section 96 set out exceptions to the general principle of the finality of Board decisions. Section 96(2) defines the limited circumstances in which the Board, on its own initiative or on application by a party, can exercise its discretion to reopen a matter that has been previously decided by the Board.

For our purposes, the most significant sections are 96(4) and (5). Section 96(4) outlines the general principle that the Board can reconsider its own decisions or orders. Section 96(5) removes that power where more than 75 days have elapsed since the decision or order was made. Section 96(5) also provides that the Board cannot reconsider a decision or order once a review has been requested under section 96.2 or an appeal has been filed under section 240.

Following the introduction of Bill 63, the "75 day rule" introduced by section 96(5) caused considerable confusion. When the 75-day period started and ended, to what decisions the rule applied – were the subject of considerable discussion and scrutiny. Many mistakes and mishaps occurred. Much effort was made throughout the entire workers' compensation system to understand what seemed to be a very harsh finality rule which had been newly introduced into a system that had, at least to some extent, operated without one.

Examples abounded. Board officers considered that they could not implement appellate decisions because that would require them to "reconsider" previous Board decisions (the ones that had been appealed) more than 75 days after they had been made. Board officers considered that they could not correct obvious arithmetical errors after more than 75 days had passed. They considered that they could not adjudicate a new diagnosis or a new condition if more than 75 days had passed since the decision to accept an injury/disease had been made. The Board often took these positions regardless of whether the decision had been communicated to the affected parties.

These are examples of decision-makers familiar with one system trying to grapple with a significantly new and different one. Eventually, the situation began to settle down. Practice directives were issued, policy was written, business processes were developed and appellate decisions were made. Now the system accepts, for example, that implementing an appellate decision is not a reconsideration, that the Board has the power to correct obvious errors, that it can adjudicate new matters as they arise and that decisions need to be communicated before the 75-day time period starts.

One business process seems to have led to the situation we apparently face in the appeal before us. Items #96.20 and #96.30 of the RSCM now set out a clear distinction between the roles of the case managers and the disability awards officers with respect to decision-making. Decisions regarding a worker's entitlement to vocational rehabilitation benefits or a permanent disability award are dependent upon the conclusions of the case managers regarding the permanent conditions accepted under the claim and the worker's limitations and restrictions. Although case managers do not appear to issue decision letters regarding the permanent conditions accepted under a claim which, according to these policies, bind the disability awards officers, they began to issue letters advising workers of the limitations and restrictions on their activities caused by those accepted conditions. These were stand-alone letters that did not appear to contain any explicit decisions regarding benefit entitlement, yet they frequently claimed to be decisions and included information about review rights. Parties dutifully requested reviews of them only to have their reviews rejected because the letters did not contain a "decision" about benefit entitlement.

Happily, this practice appears to have stopped, and to that extent our decision on this appeal may be academic (or should be). However, the review officer who issued the review decision which is before us concluded that it was necessary to contain that mischief. He developed the "findings of fact" construct which has made its way into a

Best Practices Information Sheet (BPIS), and many Review Division and WCAT decisions. The effort was a laudable one – to differentiate between those determinations which are subject to the "75 day rule" and therefore also binding on subsequent decision-makers, and those which are not. In this construct, the former are decisions; the latter are findings of fact. In our view, the question is, as it always has been, one of jurisdiction. In actuality, this is a new effort to address an old problem, but it is a problem that has now been made significantly more difficult due to the "75 day rule."

Analysis of the Legislative Scheme and the Winter Report

As noted by the panel in *WCAT Decision #2006-00480*[1], the "modern principle" approach and the "ordinary meaning rule" apply to statutory interpretation in Canada.

The "modern principle" of statutory interpretation involves a purposive analysis of the legislation. In *R. v. Jarvis*, [2002] 3 S.C.R. 757, the Supreme Court of Canada restated the modern principle in this way, at paragraph 77:

> The approach to statutory interpretation can be easily stated: one is to seek the intent of Parliament by reading the words of the provision in context and according to their grammatical and ordinary sense, harmoniously with the scheme and the object of the statute.

In order to understand the scheme and object of the statute, we note the comments of Alan Winter, who reviewed the workers' compensation system in the *Core Services Review of the Workers' Compensation Board* (Victoria: 2002) (Winter Report)[2]. We place weight on the views of the core reviewer, as the March 3, 2003 revisions to the Act in large measure incorporated his recommendations.

Mr. Winter made general comments about the appellate structure. At page 26, he said that, in his opinion, "a much simpler appellate process must be established to deal with all disputed issues within the workers' compensation system in a fair, effective and timely manner." Mr. Winter also stressed that the principles of consistency, predictability of decisions and finality were important for the appellate structure. In particular, he noted that the former appellate structure, with its multiple levels of appeal on claims issues:

> … foster[ed] a lack of finality with respect to a worker's claim. There are many examples where, after going through one or more levels of appeal, a worker's claim is referred back to the WCB for further adjudication – which then leads to the potential of further appeals. This process has been referred to as the "treadmill" effect.

[1] All WCAT decisions cited are accessible at www.wcat.bc.ca
[2] Accessible at: www.labour.gov.bc.ca/wcbreform/WinterReport-Complete.pdf

Mr. Winter also made more specific comments about what could be the subject of a review or an appeal. He spoke of "adjudicative decisions" in both the internal review and external appeal sections of his report. He did not specifically define an "adjudicative decision," but he did, at pages 28 and 49, specifically exclude a procedural or administrative decision made by a Board officer.

When commenting on the scope of the jurisdiction of the Review Division and WCAT, Mr. Winter did not draw a distinction between actions or decisions and determinations of matters and questions of fact and law. Rather, at pages 35 to 37 and 50 to 51, Mr. Winter spoke solely of decisions or orders of the Board. Similarly, when dealing with the Board's power to reconsider and reopen matters, Mr. Winter spoke only of decisions or orders of the Board. He made no comment on the Board's power to reconsider findings of fact made in the course of a worker's claim. This is likely because the distinction or label was not being made or applied prior to the review officer's decision on appeal before us.

Mr. Winter's comments neither directly support nor do they detract from the position that findings of fact, in and of themselves and without an accompanying Board decision or order affecting entitlement or liability, are reviewable.

It has been argued that section 96(1) supports the view that only decisions or orders are final and therefore reviewable, whereas "determinations of fact" are not. Section 96(1) gives the Board exclusive jurisdiction to make determinations of fact. Arguably, because just "the action or decision of the Board on them" is final and conclusive, only the decisions themselves are reviewable but not the determinations of fact. However, we must bear in mind that 96(1) is a privative clause whose function is to set out the Board's exclusive jurisdiction, and to limit the situations in which the courts can interfere with Board decision making. The issue before us is entirely different and involves the internal appeal structure created by the Act. We do not find the language used in section 96(1), which pre-dated the "findings of fact" issue by decades, to be useful in addressing the issue arising on this appeal.

While we have concluded that the underlying intent of the legislative scheme is that only decisions or orders are reviewable/appealable and not findings of fact, we are mindful that Mr. Winter also strongly articulated that the appellate structure should provide finality. We are aware that distinguishing between findings of fact and decisions or orders may appear to negatively impact upon the principle of finality. We further acknowledge that Mr. Winter recommended a broad approach to jurisdiction.

Mr. Winter also articulated the important underlying principles of consistency and predictability in the appellate structure. Although jurisdictional issues may arise on a particular review or appeal, parties and their representatives should generally be able to make accurate predictions about the types of determinations that are or are not reviewable.

As we have noted above, the Board's recently introduced practice of providing separate letters to parties setting out limitations and restrictions, some of which also included review information, has prompted parties and their representatives in some cases to appeal the Board's findings of fact out of an abundance of caution. It has also caused decision-makers to carefully review the adjudicative history on a claim to determine their jurisdiction to make a new decision. All of this has resulted in inconsistency and confusion rather than enabling the system to be accessible and understandable to the average, unrepresented party.

Board Policy

There is no specific item of Board policy in the RSCM that deals squarely with the question of whether a finding of fact is reviewable (although there is Board practice that we will review in detail below).

We note that Board policy about changing previous decisions in chapter 14 of the RSCM (dealing with, for example, reconsiderations and reopenings) refers to "decisions," "orders," and "matters previously decided." This language echoes the statutory language in the various provisions noted above. Similarly, chapter 13 of the RSCM uses language that refers to "decisions" or "orders" of the Board.

While there is no specific Board policy on the issue under appeal, we find it useful to review Board policy that surrounds the determination of a worker's permanent restrictions and limitations, as this is the specific finding of fact that the worker's representative contends is reviewable in this appeal.

In most appellate decisions we reviewed, a dispute arose about the appealability of the Board's statement regarding the worker's restrictions and limitations. This statement is usually made at that point in the life of a claim when a worker's temporary wage loss benefits are being concluded and there is potential future entitlement to a permanent partial disability award and/or vocational rehabilitation assistance.

Once a Board officer has determined that a physical impairment exists, item #34.10 of the RSCM explains that the next step is to determine the extent of compensation payable or the consequences of the impairment. A two-step process is contemplated: first, making findings of fact about whether the temporary physical impairment exists and whether it has an impact on employability; and second, making a decision about whether the worker is entitled to benefits for the impairment.

A similar process is contemplated in item #34.50 of the RSCM in that a Board officer first determines whether a temporary disability exists and then whether any benefit entitlement flows from it.

Despite having outlined a two-step decision making process, Board policy does not make a clear distinction between findings of fact about temporary impairments and their impact on employability on the one hand and decisions about entitlement to temporary wage loss benefits on the other hand. We can appreciate that there is a fine line between these two determinations and that they are inter-related. We recognize that it will be impossible to determine the entitlement to temporary wage loss benefits without first resolving the factual dispute about whether a temporary physical impairment exists and whether that impairment affects a worker's employability. We acknowledge that the inter-relatedness between the factual findings and the ultimate entitlement decision makes it practical for the Board officer to outline both the findings of fact and the entitlement decision in the same letter.

Moreover, we are mindful of the practical benefit to a Board officer of addressing the question of whether a worker can return to their pre-injury employment at that point in the life of a claim. It may assist in giving direction for planning purposes about how a worker's claim will be administratively and medically handled and, thus, may not be intended to constitute a binding decision on the worker's potential future entitlements.

Those areas of potential future entitlement (where decisions about a worker's restrictions and limitations are likely to form a foundation for the entitlement decision) are usually vocational rehabilitation benefits under section 16 of the Act and a projected loss of earnings award under section 23(3) of the Act.

When examining Board policy about eligibility for vocational rehabilitation assistance, we note that various items in chapter 11 of the RSCM define the goals of and eligibility for vocational rehabilitation assistance in terms of what specific job or occupation a worker can return to (either their pre-injury employment or another suitable occupation up to their pre-injury wage rate). To determine what specific job or occupation a worker can return to, a Board vocational rehabilitation consultant must consider the medical and other evidence about a worker's restrictions and limitations. These determinations can be characterized as findings of fact that then form the basis for the vocational rehabilitation consultant's entitlement decision (that is, whether the worker is eligible for vocational rehabilitation benefits and what form those benefits will take).

Similarly, Board policy directs disability awards officers to consider the medical and other evidence about a worker's restrictions and limitations when determining what specific job or occupation a worker can return to over the long term. In this situation,

these findings of fact form the basis for the disability awards officer's entitlement

decision about a projected loss of earnings award. Item #40.00 of the RSCM specifically provides that:

> In all cases, the Board must determine if, following recovery from a work injury, a worker is either able to return to the occupation at the time of injury or to adapt to another suitable occupation. **This determination includes consideration of both the worker's transferable skills and the worker's post-injury functional abilities.** In the vast majority of cases a worker's entitlement to a permanent partial disability award is determined under the section 23(1) method and this estimate of impairment of earning capacity is considered to be appropriate compensation.
>
> However, in exceptional cases, the amount determined under section 23(1) may not appropriately compensate a worker. **In these cases, medical evidence confirms that the work injury makes it impossible for a worker to continue in the occupation at the time of injury or in an occupation of a similar type or nature.** In addition, the worker is considered unable to adapt to another suitable occupation without incurring a significant loss of earnings due to the work injury.
>
> [emphasis added]

We also note the conclusions of the panel in *WCAT Decision #2006-01590* that the Board, when carrying out an assessment under section 23(3), must also consider the ability of the worker to continue in the pre-injury employment or to adapt to another suitable occupation. In that case, the Board accepted that, as a result of the medical restrictions and limitations accepted on his claim, the worker was unable to return to his pre-injury job. The panel went on to examine and weigh the medical and other evidence of the worker's restrictions and limitations and came to a different conclusion than the Board about what constituted the worker's permanent restrictions and limitations. The panel then used this conclusion as part of the factual foundation to determine the worker's entitlement to a section 23(3) award. In other words, this case illustrates that a prior Board determination of the worker's restrictions and limitations, which can be characterized as a finding of fact, did not bind the appeal tribunal when considering entitlement to a projected loss of earnings award at a later date.

We conclude, from a review of Board policy about eligibility for vocational rehabilitation assistance and entitlement to a projected loss of earnings award, that the decision-making process contemplates that the responsible Board officer will consider the medical and other evidence about a worker's restrictions and limitations and come to a conclusion about what those restrictions and limitations are. The Board officer will then make an entitlement decision, which may be the subject of a review and

appeal. So long as Board officers follow this practice, without issuing an interim letter setting out the factual findings only, the problem arising on this appeal should not occur.

We note that the review officer in the decision under appeal cited item #96.30 of the RSCM which outlines the responsibilities of Board officers in the Disability Awards Department. He stated that it is Board practice that the case manager accepts an actual or potential permanent disability and refers the worker's claim to the Disability Awards Department. The review officer noted that the case manager will normally outline in the referral document:

> …any findings of fact as to the limitations and restrictions that the worker's condition places on the worker having regard to his or her occupation. The decision of the Board Officer in Disability Awards is generally expected to be in line with those findings of fact, but this may not happen in some situations.

The review officer's statements are helpful in coming to an understanding of the Board's business practices and the view that findings of fact made in this circumstance are not necessarily binding on subsequent decision-makers. We have observed, however, that although the findings of fact regarding a worker's limitations and restrictions become the factual foundation of subsequent entitlement decisions, the decision regarding what permanent conditions are accepted under the claim has not been consistently communicated in writing to workers. This has resulted in confusion regarding whether those are binding decisions on subsequent decision-makers or whether they are findings of fact as well.

Board Practice

The Board issues practice directives which are not binding Board policy, but provide adjudicative guidance to Board officers. Best Practices Information Sheet #14 (BPIS #14) explains the difference between decisions and findings of fact. It is helpful in understanding the Board's practice in distinguishing between a finding of fact and a decision.

BPIS #14 first reviews the applicable law and policy but, in our view, incorrectly relies on section 96(1) in support of an analysis that essentially equates findings of fact to determinations of questions of fact, which is the phraseology used in that section. It adopts the reasoning of *WCAT Decision #2006-00656* that section 96(1) distinguishes between actions or decisions and determinations of matters and questions of fact and law. As discussed above, section 96(1) does not, in our view, assist this

analysis. Perhaps one of the oldest sections of the Act, it was designed for a completely different purpose – to codify the historic trade-off which ousted the jurisdiction of the courts.

Despite our view of that portion of BPIS #14, the remainder of the document is helpful in understanding the Board's practice in distinguishing between findings of fact and decisions. BPIS #14 raises the following points of analysis:

- findings of fact do not attract the same finality and conclusiveness as decisions;
- the Board's ability to revisit findings of fact is not restricted in law or policy;
- findings of fact are conclusions about the evidence, but do not confer or deny entitlement;
- there are no immediate consequences to findings of fact, but they are potential bases for future entitlement decisions;
- findings of fact are not "final," but are subject to change based on new information, the discovery of an error or further consideration of those facts. This provides the Board with flexibility and helps to ensure that the entitlement decisions that flow from the factual findings are correct; and
- the changeable nature of findings of fact may be most apparent where different Board departments are involved in making determinations on the same or similar evidence but for different purposes.

We agree in general with the Board's analysis and reasoning, however, we wish to note that one of the Board's statements in BPIS #14, when read in isolation, may create a lack of certainty for parties considering whether to dispute a Board officer's finding of fact.

The Board notes that, "[a]lthough findings of fact are not "final" in the sense that decisions are, previous findings are not changed unless there is a genuine reason to do so." We recognize that this statement may provide the Board with some efficiency in its operations, such that another Board officer does not necessarily need to review a prior finding of fact. However, in our view, this statement may confuse parties who need reassurance that Board officers, when making future entitlement decisions, will not feel bound by prior findings of fact. We consider that this statement in BPIS #14 should be read in conjunction with the next major section of BPIS #14, which makes the following important points about review and appeal rights:

- workers and employers have the right to request a review of any Board decision respecting compensation or rehabilitation and can dispute any findings of fact that are relevant to those reviews regardless of when those findings were made;
- there is no point to the Review Division or WCAT considering findings of fact in isolation from the entitlement decisions based on those facts. There would be no remedy to impart unless the corresponding entitlement issue was also before the appellate body; and,
- the alternative approach would result in parties being compelled to request a review of factual determinations before those findings of fact had any impact on

> entitlement, even though, in some cases, the findings will never become material to determining entitlement.

We agree with the above points, particularly the need to avoid reviews and appeals that are based solely on findings of fact that have yet to impact entitlement.

The final section of BPIS #14 gives guidance to Board officers about communicating findings of fact. In particular, it states:

> Officers should avoid communicating findings of fact in writing, separate from entitlement decisions. Such correspondence has proven to be problematic because parties mistakenly interpret the letters to be reviewable decision letters.

This illustrates the critical need for all components of the workers' compensation system to take a consistent approach to the question of the appealability of findings of fact. This provides the parties with some measure of predictability and certainty about what constitutes an appealable decision.

As noted by the Supreme Court of Canada in *Consolidated Bathurst Packaging Ltd. v. I.W.A. Local 2-69* (1990), 68 D.L.R. (4th) 524, tribunals must strive for continuity, consistency and predictability. In our view, these are important goals for the workers' compensation system.

Approach Taken by Previous WCAT Panels

We also reviewed the approach taken by prior WCAT panels. The overwhelming majority have followed BPIS #14 and the approach taken by the review officer in the decision under appeal.

While the analysis of previous panels is not binding upon us, there are several prior WCAT decisions that we wish to note:

- In *WCAT Decision #2006-00656*, the panel analyzed the distinction between findings of fact and decisions in section 96(1) of the Act. The panel concluded that a case manager's statement about a worker's restrictions and limitations did not amount to a decision or order within the meaning of section 96(5) of the Act. He stated that the Board "is free to restate the restrictions and limitations." A number of subsequent WCAT decisions have followed the analysis developed by the panel in *WCAT Decision #2006-00656*.

- In *WCAT Decision #2006-01296*, the panel cited the review officer's decision under appeal and adopted his reasoning. A number of WCAT panels have followed the

reasoning in this WCAT decision. In particular, the panel analyzed the competing policy interests underlying the issue under appeal and concluded that:

> From a literal perspective, virtually every finding made on a claim could be characterized as a final decision regarding a compensation or rehabilitation matter, and therefore reviewable under section 96.2(1)(a) of the Act. However, taking into account the current legislative scheme, and the fact that there are often no immediate consequences to a worker arising from conclusions about limitations and restrictions, I find that this type of finding is not "final" but rather subject to change, and not a "decision … under Part 1" as it does not confer or deny entitlement. In my view, it is preferable to regard such findings as the potential bases for later reviewable decisions, thereby allowing the Board to retain the flexibility to change or correct the findings. The alternative approach would result in parties being compelled to request a review of a conclusion before it has any impact on entitlement.

- In *WCAT Decision #2006-02738*, the panel explored the degree of deference that should be accorded to prior findings of fact. In particular, the panel noted that the findings of fact of appellate bodies on which an entitlement decision was based are binding, subject only to reconsideration under section 256 of the *Act*. The panel stated that:

> While the factual findings from prior levels of decision-making are important, and may well merit a degree of deference in the absence of significant new evidence, those previous findings of fact are not in and of themselves binding. For example, a finding of fact in a prior appellate decision may merit a high degree of deference where all parties have had an opportunity to test that finding through the provision of all available evidence and to make submissions in support of their position. However, even a finding of fact at the final level of appeal may be changed on reconsideration when the WCAT chair determines that significant new evidence is discovered that requires a different factual finding.

- In *WCAT Decision #2006-03824*, the panel noted that WCAT has no jurisdiction over findings of fact in isolation from an entitlement decision if WCAT would have no jurisdiction over the entitlement decision itself. In this particular appeal, the context for the Board's finding of fact was a decision about entitlement to vocational rehabilitation benefits. The panel stated:

> That the finding of fact supports the decision that the worker is entitled to vocational rehabilitation is all the more reason not to consider it. If the Act precludes a decision from being an issue before me, it also precludes the issue of the correctness of a finding of fact supporting that decision from being an issue in its own right before me. To find otherwise would subvert the intent of sections 239(1) (that only a final decision of a review officer may be appealed) and 239(2)(b) (that vocational rehabilitation decisions may not be appealed).

- In *WCAT Decision #2006-04596*, the panel concluded that a letter setting out findings of fact regarding the worker's ability to return to his pre-injury form of work was a reviewable decision where the disputed findings had an impact on the worker's entitlement, although not in the letter reviewed, and there was no other mechanism for the worker to bring the dispute. In finding that there was a reviewable decision the panel, said:

> [This]…approach, which has been incorporated by several WCAT decisions, is reasonable to the extent that it is applied to determinations which are treated by the Board as interim findings of fact which have no immediate impact on a claim, and merely form the basis for later reviewable decisions. In those cases, it is practical for everyone within the compensation system to treat them as non-reviewable findings of fact which do not attract a right of review and which may form the bases for later reviewable decisions. This approach allows the Board to retain the flexibility to change or correct the findings and involves, in essence, a deferral of a party's right of review in an effort to limit the impact of legislative prohibitions against reconsideration. It is not based in the legislative language regarding review and appeal rights, and ought not, in my view, to prevent a party from exercising those rights where the finding has not been expressed or treated as an interim one, and in particular, where there is no other mechanism for bringing the dispute.
>
> …
>
> I realize that the Review Division definition of "decision" incorporates the concept of benefit entitlement and that the November 17, 2005 letter, arguably, does not directly confer or deny entitlement. However, that restriction on review rights is not contained in the Act itself nor in policy which is binding on WCAT.

> Section 8 of the *Interpretation Act* states that an enactment "must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". This approach must apply to the interpretation of the term "decision" in section 96.2(1)(a). I note also that the *Core Services Review of the Workers' Compensation Board* (the Winter Report) recommended a broad approach to jurisdiction. Section 250(2) of the Act directs WCAT to make its decisions "based on the merits and justice of the case".
>
> Bearing in mind the wording of the November 17, 2005 letter, the worker's multiple attempts to dispute the findings regarding his employability, and adopting a liberal and purposive approach to the statutory review provisions, I find that the worker has a right to review the November 17, 2005 letter. Although the general approach to findings of fact may be reasonable in some circumstances, I find that it cannot be applied so as to deprive a party of a statutory right of review where the disputed findings have an impact on entitlement and there is no other mechanism for bringing the dispute.

- In *WCAT Decision #2006-02105*, the panel extended the analysis adopted in *WCAT Decision #2006-01296* beyond the more common scenario of a Board's finding of fact about a worker's restrictions and limitations. He applied the analysis to the scenario where the Board has communicated a potential retirement date in a letter to the worker, but the Board letter did not confer or deny entitlement to a permanent partial disability award.

- In *WCAT Decision #2006-02428*, the panel found that a Board finding of fact about the worker's employability was reviewable in the context of an entitlement decision about temporary wage loss benefits. The panel took jurisdiction over the Board's statement or finding of fact about whether a worker could return to his pre-injury work. The panel concluded that while the worker was not entitled to further temporary wage loss benefits on the basis that his medical condition had stabilized, the Board erred in saying that the worker could return to his pre-injury work with modifications. However, the panel struggled with identifying the remedy that flowed from his finding, stating that:

  > I am not able to identify the specific benefits accruing to the worker as a consequence of my finding of fact that he was not capable of returning to his pre-injury employment, even as modified. As the worker's disability is no longer temporary, he is not entitled to temporary disability benefits. However, he is suffering a loss of earnings at this time due to being unable to do his pre-injury job, and I find that the Board must consider the

> implications of my finding with respect to the worker's entitlement.

Having reviewed prior WCAT decisions dealing with the issue under appeal, we note that the majority of the panels have adopted the approach taken by the Board in BPIS #14.

Submissions of the Parties

The parties have raised various policy interests that we will consider below. The parties have also made specific arguments about the particular circumstances of this appeal that need to be reviewed and considered.

Competing Policy Interests

This appeal raises difficult issues that have wide implications for the worker's compensation system. We consider it necessary to analyze and discuss some of the competing policy interests to help provide a practical framework for our resolution of the issue under appeal.

We agree with the review officer, Mr. Winter and other panels who have noted the need for continuity, consistency and predictability in the workers' compensation system. We also agree that the legislative scheme should be interpreted consistently and viewed as one inter-related scheme. We acknowledge that the principle of finality is an important aspect of the workers' compensation system, particularly since the legislative changes that came into effect in 2003. We recognize that opening up the question of a finding of fact to re-determination by various Board officers during the life of a claim may result in inconsistencies in the handling of a claim, or that resolution of some issues on a claim might be unnecessarily delayed.

We are also aware that findings of fact may have a profound effect on a worker's future entitlements, so we can fully understand and appreciate why a worker would want to review or appeal such a finding at the earliest possible time. It is an entirely reasonable position for parties to take, given their legitimate concerns that they may lose their right to review or appeal later decisions which rely on the Board's findings of fact. Maintaining an accessible review and appeal system for parties, particularly those who are unrepresented, is also an important principle underlying the workers' compensation system.

While finality and certainty are important interests, we also consider that there is a competing policy interest of flexibility. We agree with the review officer and previous WCAT panels, that the Board needs to be afforded the flexibility to revisit findings of fact, which often involve fluid circumstances of complex medical and other issues. By

recognizing the need for flexibility in the system, the system can uphold the fundamental principle of fairness in the following ways:

- avoid an unnecessary volume of appeals where findings of fact may not yet (or may never) have an impact on entitlement;
- avoid potentially incorrect but binding determinations by appellate bodies made without the benefit of the context of the entitlement decision and without a clear remedy that the panel can grant. This is particularly important in areas of entitlement (for example, vocational rehabilitation) where the legislature has clearly intended that WCAT has no jurisdiction; and
- avoid adverse consequences to parties or to the Board where the Board felt itself bound by medical findings, which later turn out to be wrong.

Reasons and Findings

One of the difficulties in grappling with this appeal is the fact that the terminology "findings of fact" and "limitations and restrictions" is relatively new and constitutes a response to the finality in decision-making introduced into the workers' compensation system by sections 96(4) and (5). We have concluded that, at this point in the development of the model articulated by the Review Division decision before us, as well as in BPIS #14, it would be prudent to restrict the scope of our decision on this appeal as narrowly as possible. This is because the implications of our decision may be far-reaching and not entirely predictable and because, as we described above, the whole exercise involves an examination of the fundamental question – what is a decision?

We turn first to the narrow question before us – whether the December 15, 2004 letter contains a reviewable decision. The panel finds, firstly, that the refusal to refer the worker for rehabilitation is a reviewable decision. The Review Division's own definition of "decision" includes "entitlement to a benefit or benefits...under any section of the *Act*," and a referral to the Vocational Rehabilitation Department is certainly a prerequisite for entitlement to benefits under section 16 of the Act. Therefore, a refusal to refer a worker to rehabilitation has the same effect as a refusal of all rehabilitation benefits and is a reviewable decision.

Although the decision refusing to refer the worker to the Vocational Rehabilitation Department was not articulated explicitly in the December 15, 2004 letter, we consider that it was included by necessary implication since that decision was made at the team meeting and recorded in the related memo of that same date, and the letter purported to communicate the matters discussed and decided in that team meeting. We therefore allow the appeal on that basis. The worker is entitled to a review of the December 15, 2004 decision refusing to refer her to the Vocational Rehabilitation Department.

Although not necessary to our decision, we have concluded that some comment on and analysis of the "findings of fact" model articulated by the review officer in the decision before us and in BPIS #14 would be useful.

We begin our analysis by examining the December 15, 2004 letter to determine whether, in the absence of the underlying memo, we would have found it to be reviewable. This is, of course, a more challenging question. That letter addresses several issues, sets out decisions regarding pension entitlement and includes review information. The decision on benefit entitlement which will flow from the aspect of the letter which the worker is disputing – her employability – is not set out in the letter, but is deferred pending a loss of earnings assessment.

In *WCAT Decision #2006-04596*, previously discussed above, a member of this panel stated as follows regarding the Review Division's general position on findings of fact:

> The review officer's refusal to conduct a review of the November 17, 2005 letter is consistent with a series of Review Division decisions which distinguish between reviewable decisions and findings of fact. The distinction is addressed in *Review Decision #28687*, which involved a worker's request for review of a finding about her fitness to work. The review officer characterized that determination as a "finding of fact", as opposed to a decision regarding entitlement, and concluded that the finding was not reviewable. He pointed out that conducting a review in those circumstances could be pointless, as the finding may never have an impact on the claim, and could preclude the Board from changing the finding in the future based on new information or discovery of an error. With respect to the relationship between the reconsideration and review provisions set out in sections 96(5) and 96.2 of the Act, respectively, he stated as follows:
>
> > The fact that a Board officer has previously made a finding of fact does not preclude that finding from being later changed. Section 96(5) of the *Act* imposes restrictions on reconsidering prior decisions, for example that no reconsideration can take place after a lapse of 75 days. However, this section must be interpreted in a consistent fashion with the provisions for requesting a review under section 96.2. The review provisions are intended to be complementary to the reconsideration sections. The *Act* envisages that, where the restrictions on reconsideration apply, there will still be a right to request a review or an extension of time to request of review, and visa versa. Therefore, if a simple finding of fact is not reviewable under section 96.2, the restrictions in section 96(5) also do not

> apply to that finding. The restrictions in section 96(5) only apply to reviewable decisions.

As quoted earlier, in *WCAT Decision #2006-04596*, the panel concluded that this general approach to findings of fact may be reasonable in some circumstances. However, it cannot be applied in such a manner as to deprive a party of a statutory right of review where the disputed findings have an impact on entitlement and no other mechanism is available for bringing the dispute. We agree with and adopt that approach.

In our view, there is much merit to a system-wide adoption of the model set out in the decision before us on this appeal and in BPIS #14 (subject to our reservations regarding the applicability of section 96(1) to this analysis). Doing so promotes consistency and predictability, avoids unnecessary appeals and hopefully, also cyclical "treadmill" appeals. In our view, this is really nothing more than repackaging jurisdiction. Every decision-maker at every level of the workers' compensation system must determine what their jurisdiction is when making a decision on a matter, whether there are previous decisions which limit their jurisdiction, whether they have the statutory jurisdiction to make the decision, etc. We generally adopt the approach set out in those two documents subject to the caveat illustrated by *WCAT Decision #2006-04596*. That is, there may be some circumstances in which parties have detrimentally relied on the way in which the Board characterized a determination on their claim and, in those circumstances, the determination may be reviewable.

Having said that, we wish to discourage Board officers from issuing letters that may be perceived by the parties as containing reviewable decisions where that was not the Board's intention. They are confusing and do not serve any useful purpose. If such letters are issued, it is crucial that they be clear that they are interim, changeable, not reviewable and may or may not form the basis of a later decision.

We do not intend to go further in our analysis of this question at this point because we have more questions than answers. Due to the circumstances of this appeal, we have focused on findings of fact in isolation, that is, those which have not served as the basis for an entitlement decision. It is therefore unnecessary for us to address whether the factual determinations underlying or underpinning an entitlement decision form part of the decision.

We find that the December 15, 2004 letter contains a reviewable decision regarding the worker's entitlement to a referral to the Vocational Rehabilitation Department and she is entitled to a review of it on that basis.

The appellant's counsel asked the panel, in the alternative, to find that the Board is not bound by the contents of that letter in considering the worker's entitlement to a loss of earnings pension. For all of the reasons set out above, we find that the findings of fact regarding the worker's restrictions and limitations in the December 15, 2004 letter are not reviewable in and of themselves. The worker will be entitled to raise the issue of her restrictions and limitations at the time the Board makes the decision on her loss of earnings award and at any subsequent review or appeal of that decision.

Conclusion

We allow the appeal and vary the August 8, 2005 Review Division decision. We find that the December 15, 2004 decision of the case manager contains a reviewable decision regarding the worker's entitlement to a referral to the Vocational Rehabilitation Department. We also find that the findings of fact regarding the worker's restrictions and limitations set out in the December 15, 2004 letter are not reviewable.

No expenses were requested and it does not appear from a review of the file that any expenses were incurred related to this appeal. We therefore make no order regarding expenses of this appeal.

Susan L. Polsky Shamash
Vice Chair

Michelle Gelfand
Vice Chair

Luningning Alcuitas-Imperial
Vice Chair

SLPS/lc